UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

In the Matter of

CLEARWATER SPRINKLER SYSTEM, INC.

Employer

and Case 5-RC-15380

UNITED ASSOCIATION OF
SPRINKLER FITTERS, LOCAL 536 a/w
UNITED ASSOCIATION OF PLUMBERS
AND PIPEFITTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein call the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Clearwater Sprinkler System, Inc., (hereinafter "the Employer"), a Maryland corporation, is engaged in the business of installing sprinkler systems for fire protection at its Baltimore, Maryland location. During the past 12 months, a representative period, the Employer purchased and received at its Baltimore,

Maryland facility, products, goods and materials valued in excess of $50,000 directly from points located outside the State of Maryland. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act.

The United Association of Sprinkler Fitters, Local 536, a/w Association of Plumbers and Pipefitters, AFL-CIO (hereinafter "the Petitioner" or "the Union") filed a petition seeking to represent a unit of all sprinkler fitters and helpers, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act. The parties stipulated to the following unit: all full-time and regular part-time sprinkler fitters and helpers employed by the Employer at its Baltimore, Maryland location, excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act. The Petitioner asserts that there are approximately 14 employees in the petitioned-for unit. The Employer contends that the petitioned-for unit consists of 16 employees.

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. There is no history of collective bargaining between the parties.

The parties stipulated to exclude President F. Michael Morgan[1] and Bookkeeper/Secretary Desiree Dunnigan from the petitioned-for unit.

The Employer presented as its witness President F. Michael Morgan. The Petitioner presented as its witnesses former employees John Warehime and Howard Keys.

ISSUES

1. Whether Patrick Snyder is a supervisor within the meaning of the Act.

2. Whether Fred Morgan is an office clerical employee and, therefore excluded from the unit.

3. Whether Fred Morgan should be excluded from the petitioned-for unit based on his relationship to the owner of the Employer and because he does not share a community of interest with the unit employees.[2]

[1] F. Michael Morgan has the authority to hire and fire employees.
[2] The Petitioner did not explicitly contend at the hearing or in brief that Fred Morgan should be excluded from the unit based on his relationship to the owner of the Employer. However, evidence was presented as to the familial relationship between Fred Morgan and F. Michael Morgan, and as discussed below, I find that Fred Morgan is not excluded from the unit on the basis of his relationship to the president of the Employer.

POSITIONS OF THE PARTIES

The Petitioner contends that Fred Morgan should be excluded from the unit on two different grounds:[3] (1) office clerical; and (2) lacking a community of interest with unit employees. As to Patrick Snyder the Petitioner contends he is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from any unit found appropriate.

The Employer asserts that Snyder is a working foreman and Morgan is a truck driver/helper, and both should be included in the petitioned-for unit.

THE EMPLOYER'S OPERATION

The Employer designs and installs sprinkler systems, fire pumps, and stand pipe for fire protection systems. The Employer's offices are located in Baltimore, Maryland. The Employer is owned 100 % by President F. Michael Morgan, whose duties include estimating purchasing, designing, managing, signing checks, and controlling all aspects of the company. The Employer's Bookkeeper/Secretary Desiree Dunnigan handles bookkeeping and permits, schedules testings, writes checks, and assists in the running of the business.

At the time of hearing, the Employer was performing 6 to 8 jobs that had an average of 2 to 3 employees at each job site. Typically, the Employer's employees go directly to their job sites at the beginning of the day. Work hours are generally from 7:00 a.m. to 3:30 p.m. F. Michael Morgan oversees the Employer's operations and jobs. Typically each job has a working foreman who has a Nextel phone that allows F. Michael Morgan to communicate with the working foreman. The Employer has 6-8 vans and trucks that it utilizes and each of these vehicles carries the Employer's logo.

SUPERVISOR ISSSUE

The Petitioner contends that Patrick Snyder is a supervisor within the meaning of the Act. Patrick Snyder holds several titles, foreman/ sprinkler fitter and superintendent.[4] Snyder reports to F. Michael Morgan. Snyder has no authority to promote, transfer, lay off, recall, or reward employees**.** Snyder spends a majority of his time installing pipe, driving employees to jobs, climbing ladders and scaffolding, and assembling fire pumps. Snyder also visits Fire Marshall offices, picks up permits and drawings, and meets with contractors.

Snyder has the authority to inspect work and report rule infractions to either Desiree Dunnigan or F. Michael Morgan. Snyder has the independent authority to fire employees and to send employees home without pay, and has exercised these authorities.

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[3] The Petitioner in its brief withdrew its contention that Fred Morgan is a managerial employee.
[4] In a letter to John Warehime dated March 22, 2002, Snyder is referred to by Dunnigan as superintendent.

Like working foremen,[5] Snyder possesses a Nextel phone and drives a company vehicle to and from work. Snyder has the authority to approve leave and, according to Employer documents, is in charge of checking on employees as to whether they are wearing hard hats, boots, tool belts, and safety glasses while on job sites. Additionally, Employer documents show that Snyder has the authority to allow employees to leave job sites during the working day.

It is undisputed that Snyder on several occasions directed employees who were late for work not to come to work.[6] Snyder also has the authority to make decisions regarding job starting times, job materials needed, as well as purchasing issues. In addition, Snyder has the authority to allow employees under his supervision to use company vehicles. Snyder passes out paychecks, collects and distributes time cards, receives similar benefits as all other employees, is paid hourly, and does not have an office. However, Snyder receives $3 per hour more than any unit employee.

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed-out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit Corp.*: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between

[5] The following employees were identified as working foremen: Dave Glazer, Clinton Brown, and Edrick Ardis. These employees are not at issue and are included in the unit.

[6] The employees that Snyder gave directions not to come to work because they were late were Jesse Wilson, Rob Grobos, and Howard Keys. All of these directions were done independently, without consultation with F. Michael Morgan or Desiree Dunnigan, and occurred in March and April 2002.

management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Kentucky River Community Care, Inc.*, 523 U.S. __ (2001). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

I find the Petitioner has satisfied its burden to establish that Patrick Snyder is a supervisor within the meaning of Section 2(11) of the Act. The evidence establishes that Snyder possesses and has exercised the direct authority, using independent judgment, to fire employees and to send them home without pay. He also possesses and has exercised the independent authority to allow employees to leave job sites during the working day, and to tell employees who call in late for work to stay home for the day. Snyder makes decisions about job starting times and materials needed for jobs. He directs employees to use the Employer's credit as well as authorizes employees to operate the Employer's vehicles. Finally, while not determinative, Snyder is paid $3 per hour more than any employee in the petitioned-for unit. In these circumstances, I find that Patrick Snyder is a supervisor within the meaning of Section 2(11) of the Act. See *Fred Myer Alaska, Inc.*, 334 NLRB No. 94, slip op at 4 (2001); *Laborer's International Union of North America*, 285 NLRB 1026, 1028 (1987).

ELIGIBILITY OF FRED MORGAN

Fred Morgan's job title is sprinkler fitter/truck driver. Fred Morgan delivers materials, loads and unloads trucks, picks up ladders, and threads power grooving machines, cutters, pipe cutters, and pipes. According to the testimony, Fred Morgan spends 90% of his time making deliveries, approximately 10% of his time doing sprinkler fitter work and approximately 5% of his time in the office performing tasks such as calling in orders on materials. He is supervised by Dunnigan and F. Michael Morgan. Fred Morgan has worked for the Employer for 3 to 4 years and owns no interest in the Employer. Fred Morgan does not keep books, prepare reports, or keep any records for the Employer. When in the office, Fred Morgan answers the Employer's phone, but only if no else is present. Fred Morgan is paid hourly and receives the same benefits as all other employees. Lastly, Fred Morgan does not evaluate, direct, or otherwise possess or exercise authority on behalf of the Employer over the employees.

In the instant case, the record is totally devoid of evidence to support a finding that Fred Morgan is an office clerical as alleged by the Petitioner. There is no evidence that Fred Morgan possesses any skills or performs duties akin to those of an office clerical employee. It is undisputed that Fred Morgan spends 90% of his workday driving a truck to make deliveries to job sites. At most, Morgan is in the office 5% of his

working time. Accordingly, I find that the evidence fails to establish that Fred Morgan is an office clerical employee as alleged by the Petitioner.

As to the family relationship between Fred Morgan and F. Michael Morgan, Section 2(3) excludes from the definition of "employee" any individual employed by his parent or spouse. Such person is completely outside the scope of the Act and is not included within a bargaining unit nor entitled to the protections of the Act. Ideal Elevator Corp., 295 NLRB 347 (1989). The Board has extended the Section 2(3) exclusion to children and spouses of persons with "substantial stock interests" in closely held corporations, Central Broadcast Co., 280 NLRB 501 (1986), and excluded from coverage of the Act persons who were the sons of an employer's owner and sole shareholder, Union Industries, Inc., 291 NLRB 436 (1988), or the children or spouses of an individual with at least a 50 percent ownership interest. Multimatic Products, Inc., 288 NLRB 1279, 1317 (1988); Cerni Motor Sales, Inc., 201 NLRB 918 (1973).

In addition, and wholly separate from the question of a challenged individual's status as a Section 2(3) "employee," the Board has excluded other individuals from bargaining units pursuant to its responsibility under Section 9(b) to determine the unit appropriate for collective bargaining. Thus, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by the Act . . .," the Board has held that "the best way to assure this freedom is to include in the unit found appropriate only those employees who share a community of interest." Cardinal Food Town, 202 NLRB 930, 931 (1973). The Board examines not only the contested individual's terms and conditions of employment in relation to those of unit employees in making this community of interest analysis, but also the overall family and business relationship among the disputed persons, their relatives, and other family members, plus their roles and responsibilities within the company in question. The Board has excluded persons from a bargaining unit where, because of family connections, that person's "interests as a member of the governing family may well outweigh his interests as an employee of the corporation and, to that extent, his interests may be entirely different from the interests of the other employees whose sole stake in the corporation is that they work there." Parisoff Drive-In Market, Inc., 201 NLRB 813, 814 (1973).

The Board's approach to this issue was explicitly affirmed by the Supreme Court in NLRB v. Action Automotive, Inc., 469 U.S. 490, 495 (1985), where the Court noted that "the Board considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from a bargaining unit." Among the relevant considerations is whether the employee resides with or is financially dependent upon a relative who owns or manages the business; the degree of family involvement in the ownership and management of the company; and whether the employee receives special job-related benefits such as higher wages or favorable working conditions. Noting that all three owners of the company were closely related and actively involved in running the business on a daily basis, the Court in Action Automotive approved the Board's ruling excluding the two relatives of the company's owners; the wife of one owner resided with her husband, both worked in the same office, she was able to take a break when she pleased -- often in her husband's office -- and unlike other clericals she worked part-time and received a salary. The Board also

excluded the mother of the company's three owners, who lived with one of the sons; who earned 25 cents per hour more than other cashiers, although she had greater experience; and who "regularly sees or telephones her other sons and their families." NLRB v. Action Automotive, 469 U.S. at 492.

I find that Fred Morgan is eligible to vote in the election. Although Fred Morgan's son owns 100% of the Employer, there is no evidence to suggest that Fred Morgan is financially dependent on his son. Fred Morgan does not live with his son, and the record fails to show that Fred Morgan receives any special privileges or benefits as a result of his family relationship. Fred Morgan performs duties as a truckdriver and is subject to the same working conditions, personnel rules, and policies applicable to all employees. He is paid hourly at a rate commensurate with that of all other employees. There is no evidence he receives more favorable or relaxed working conditions, and in all other respects the record shows he has the same terms and conditions of employment applicable to unit employees.

The Petitioner contends that Fred Morgan does not share a community of interest with the unit petitioned for and is not a residual employee because he could seek representation with Dunnigan. Contrary to the Petitioner's contention, I find that Fred Morgan shares similar working conditions, benefits, and wages with unit employees. Morgan also enjoys common supervision. I find that Fred Morgan's duties are more closely aligned to employees in the petitioned-for unit than with Desiree Dunnigan who helps manage the business and was stipulated to be a bookkeeper/office clerical and excluded from the unit. I therefore find under these circumstances that Fred Morgan's inclusion in the petitioned-for unit is required.

ELIGIBIITY FORMULA

The Board held in *Steiny & Co.*, 308 NLRB 1323 (1992), that the *Daniel* formula is applicable in all construction industry elections, unless the parties stipulate to the contrary. See also *Signet Testing Laboratories*, 330 NLRB 1 (1999). Here, the Employer's unit employees are engaged in the construction industry, and the parties did not stipulate that the *Daniel/Steiny* formula should not be applied. Accordingly, I find that the *Daniel/Steiny* formula, as set forth below, is the appropriate eligibility formula to be applied in this case.

The *Daniel/Steiny* formula to determine eligibility of employees in the construction industry provides that, in addition to those eligible to vote under the traditional standards, laid-off unit employees are eligible to vote in an election if they were employed by the Employer for 30 working days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment by the Employer in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Of those eligible under this formula, any employees who quit voluntarily or had been terminated for cause prior to the completion of the last job for which they were employed are excluded and disqualified as eligible voters. *Daniel Construction Co.*, 133 NLRB 264, 267 (1961),

modified 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992), overruling *S.K. Whitty & Co.*, 304 NLRB 776 (1991).

CONCLUSION AS TO THE UNIT

Based on the foregoing, the record as a whole, and careful consideration of the arguments of the parties at hearing and in brief, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time sprinkler fitters and helpers and sprinkler fitter/truck drivers employed by the Employer at its Baltimore, Maryland facility, excluding all office clerical employees, guards, professional employees, and supervisors as defined by the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **UNITED ASSOCIATION OF SPRINKLER FITTERS, LOCAL 536 A/W UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, AFL-CIO**

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility,* 315 NLRB 359 (1994). The Regional Director shall make the list

available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by**, MAY 10, 2002**

Dated: April 26, 2002
At Baltimore, Maryland

/s/WAYNE R. GOLD
Regional Director, Region 5

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